Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

WYSONGA McGLOTHLIN,

Petitioner,

v.

JAMES R. CULLINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals, Third District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the following questions:

I. Petitioner filed suit against a physician to recover damages arising from the puncturing of her breast implant during recovery from surgery for removal of a malignant tumor. Causes of action pled were trespass, assault and battery, and negligence. Petitioner did not have financial resources to file a $7,500 cost bond required by a Texas statute as a condition for maintaining suit against a physician. Petitioner's suit therefore was dismissed. Does the dismissal violate the Fourteenth Amendment of the United States Constitution which guarantees access to State courts, equal protection of the laws, and due process?

II. When a fundamental federal constitutional right is at stake, may a State court presume a challenged statute is constitutonal and thereby disregard the *Bullock v. Cater*[1] standard of review requiring that the statute be closely scrutinized and found reasonably necessary to the accomplishment of legitimate State objectives in order to be constitutional?

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[1] 405 U.S. 134, 144, 92 S. Ct. 849, 856, 31 L.Ed.2d 92 (1972).

LIST OF PARTIES

The parties to the proceedings below are the following:

1. Petitioner: Wysonga McGlothlin
2. Respondent: James R. Cullington

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 6

Conclusion 12

Appendix:

Judgment and Opinion of the Texas Court of Appeals, Third District, rendered April 1, 1999 ... A-1

Letter from Supreme Court of Texas, dated July 15, 1999, denying Petitioner's Petition for Review A-27

Order of Dismissal, dated April 13, 1998, entered by District Court of Travis County, Texas, 345th Judicial District A-14

Order Granting Defendant's Motion to Increase Security, dated March 12, 1998, entered by District Court of Travis County, Texas, 345th Judicial District A-15

Section 13.01 of the Texas Medical Liability and Insurance Improvement Act [Tex. Rev. Civ. Stat. Ann. art. 4590i (West Supp. 1999)] A-28

Plaintiff's Response to Defendant's Motion to Increase Security A-21

TABLE OF CONTENTS – Continued

Page

Plaintiff's March 10, 1998 letter to the Honorable Judge Peter M. Lowry, 261st Judicial District Court A-35

Affidavit of Wysonga McGlothlin (Petitioner)..... A-41

Plaintiff's First Amended Original Petition A-17

Exerpt of Appellant's Brief filed with Texas Court of Appeals, Third District A-45

Exerpt of Petition for Review filed with the Supreme Court of Texas A-49

TABLE OF AUTHORITIES

Page

CASES

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L.Ed.2d 711 (1996)..... 7

Bieregu v. Reno, 59 F.3d 1445 (3rdCir.1995)..... 7

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 103 S. Ct. 2161, 76 L.Ed.2d 277 (1983).....7, 8

Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L.Ed.2d 113 (1971).....7, 8, 10, 11

Bullock v. Cater, 405 U.S. 134, 92 S. Ct. 849, 31 L.Ed.2d 92 (1972).....i, 9, 10

Burns v. Ohio, 360 U.S. 252, 79 S. Ct. 1164, 3 L.Ed.2d 1209 (1959)..... 11

Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 28 S. Ct. 34, 52 L.Ed. 143 (1907) 7

California Motor Transport Co. v. Trucking, Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L.Ed.2d 642 (1972) 7

Harper v. Virginia Bd. of Elections, 383 U.S. 663, 86 S. Ct. 1079, 16 L.Ed.2d 169 (1966)..... 11

Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L.Ed.2d 36 (1972)..... 9

McDonald v. Smith, 472 U.S. 479, 105 S. Ct. 2787, 86 L.Ed.2d 384 (1985)..... 7

McGlothlin v. Cullington, 989 S.W.2d 449 (Tex.App. – Austin, 1999, *pet. den.*)..... 1, 3, 8

TABLE OF AUTHORITIES – Continued

Page

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973) 11

Smith v. Bennett, 365 U.S. 708, 81 S. Ct. 895, 6 L.Ed.2d 39 (1961) 11

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I 2, 6, 7

United States Constitution, Amendment XIV, Section 1 ..... 2, 5, 6, 7

STATUTES

28 U.S.C. § 1257 1

Section 13.01 of the Texas Medical Liability and Insurance Improvement Act, Tex. Rev. Civ. Stat. Ann. art. 4590i (West Supp. 1999) 2, 3, 4, 5

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review the judgment and opinion of the Texas Court of Appeals, Third District, in its cause No. 03-98-00205-CV, rendered April 1, 1999. A petition for discretionary review was timely filed with the Supreme Court of Texas on May 17, 1999, and was denied on July 15, 1999.

OPINIONS BELOW

The judgment of the Texas Court of Appeals, and its opinion reported at 989 S.W.2d 449 (Tex.App. – Austin, 1999, *pet. den.*), are reproduced in the appendix to this petition, p. A-1. The order of the lower district court dismissing Petitioner's case is reproduced in the appendix, p. A-14. An earlier order of the district court granting Respondent's motion to increase security is reproduced in the appendix, p. A-15.

STATEMENT OF JURISDICTION

The judgment and opinion which this Court is asked to review were rendered on April 1, 1999 by the Court of Appeals for the Third District of Texas. Petitioner timely filed a petition for discretionary review with the Supreme Court of Texas on May 17, 1999. The petition for review was denied on July 15, 1999. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature of Case

This case is a personal injury suit for damages brought by Petitioner against an attending physician under theories of trespass, assault and battery, and negligence. The case was dismissed without trial because Petitioner did not file a $7,500 cost bond. The order of dismissal (appendix, p. A-14) was entered by the District Court of Travis County, Texas, 345th Judicial District, pursuant to Section 13.01 of the Texas Medical Liability

and Insurance Improvement Act,[2] which Texas courts have recognized impose cost bond and expert report requirements to achieve the purpose of reducing frivolous medical malpractice claims.[3]

Facts

Following a determination that Petitioner had a malignant tumor in her breast, a surgeon removed the tumor and surrounding breast tissue. On the same day a second surgeon, Dr. Davis, performed reconstructive surgery, inserting a breast implant in Petitioner's right breast. The surgery lasted eight hours.

After surgery there was quite a bit of swelling around Petitioner's right breast and under her arm. It was necessary that the liquid causing the swelling be aspirated regularly. During the recovery period Dr. Davis had to go out of town for about a week, and he referred Petitioner to the Respondent, Dr. James R. Cullington, for temporary medical treatment. When Petitioner went to him, Respondent stuck the needle of a syringe into Petitioner's breast, pulled it out, looked at the liquid in the syringe, and said he didn't like the color of the liquid. Respondent appeared shocked and told Petitioner that he thought he had punctured her breast implant and that the fluid he saw was from the implant. Respondent told

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[2] *See* Tex. Rev. Civ. Stat. Ann. art. 4590i (West Supp. 1999) (appendix, p. A-28).

[3] *See McGlothlin v. Cullington*, 989 S.W.2d 449, 451 (Tex.App. – Austin, 1999, *pet. den.*).

Petitioner to make an appointment to see her reconstructive surgeon, Dr. Davis, as soon as he returned from out of town. Petitioner's breast flattened before Dr. Davis returned.

Petitioner went to Dr. Davis upon his return. Dr. Davis looked at her breast, saw it was flat, and said there was no doubt about it. The injury extended the length of Petitioner's recovery from surgery.

Petitioner brought suit against Appellee who filed a motion asking the district court to order Petitioner to file a $7,500 cost bond and to dismiss the case if a $7,500 cash bond was not filed. The motion was grounded on Section 13.01 of the Medical Liability and Insurance Improvement Act, Tex. Rev. Civ. Stat. Ann. art. 4590i (Vernon Supp. 1998) which requires that a party suing a physican initially file a cost bond of $5,000 or an expert's liability report.[4] Petitioner did not have the financial resources with which to either post a $5,000 bond or to pay into the registry of the Court $5,000 cash as a deposit; nor did Petitioner have the financial ability to obtain a costly expert physician's report (appendix, p. A-43).

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[4] Section 13.01(a) initially requires that, for each physician or health care provider against whom a claim is made, either (i) a separate cost bond in the amount of $5,000 be filed, (ii) $5,000 in cash be deposited in an escrow account, or (iii) an expert report be filed, not later than the 90th day after the date the claim is filed. Upon motion of a defendant if the security is not filed within 90 days after the claim is made, the trial correct is required to increase the cost bond to $7,500 and to order it filed within 21 days or else dismiss the case as to that defendant.

The district court then followed the nondiscretionary directive of Section 13.01 and entered an order dated March 12, 1998 (appendix, p. A-15), compelling Petitioner to file a $7,500 cost bond within 21 days or face dismissal of the suit. Petitioner did not have the financial ability to file and did not file a $7,500 cost bond. On April 13, 1998, the district court then dismissed the case (appendix, p. A-14).

When and How Federal Questions Raised

Petitioner timely and properly raised the federal question of her fundamental United States constitutional right of access to the courts under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The federal question was raised with the district court in Plaintiff's Response to Defendant's Motion to Increase Security (appendix, p. A-21) and was restated in a letter to the district court judge, dated March 10, 1998 (appendix, p. A-35).

On appeal Petitioner raised the federal question with the Texas Court of Appeals in her Appellant's Brief, beginning at p. iii (appendix, p. A-45). The Texas Court of Appeals engaged a presumption that the challenged statute was constitutional and upheld dismissal of Petitioner's case shown (appendix, p. A-5).

Petitioner raised the federal question with the Supreme Court of Texas in her Petition for Review, beginning at p. ii (appendix, p. A-50).

REASONS FOR GRANTING THE WRIT

The Texas Court of Appeals for the Third District of Texas has decided an important federal question – the fundamental right of access to State courts arising under the Fourteenth Amendment – in a way that conflicts with precedent of this Court. In addition, in considering Petitioner's appeal the Texas Court of Appeals failed to apply the standard of review established by this Court's precedence for considering the constitutionality of a statute which abridges a fundamental constitutional right under the United States Constitution. Whether State legislatures have the ability to foreclose access to State courts through the establishment of financial barriers in the name of reducing frivilous lawsuits and whether State courts may simply presume the relevant statutes are constitutional under federal standards without the stringent analysis that this Court deems necessary are matters that merit this Court's careful consideration.

United States citizens have a fundamental right to pursue claims in State courts that arise under the Petition Clause of the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The Petition Clause encompasses not only the right of access to the legislative branch, but also the right of access to the

courts.[5] The same ideals of liberty and democracy that resulted in the freedoms to speak, publish, and assemble also inspired the Petition Clause and are inseparable First Amendment rights.[6]

While the text of the First Amendment refers to Congress, the First Amendment also applies to the States through the Due Process Clause of the Fourteenth Amendment.[7] Thus, the right of access to the courts derives both from the First Amendment's Petition Clause and from the Fourteenth Amendment itself.[8]

The right to due process reflects a fundamental value in our American constitutional system.[9] Access to the courts is the foundation of the rule of law. This Court articulated the importance of the right of access to the courts in *Chambers v. Baltimore & Ohio Railroad Co.*:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It

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[5] *California Motor Transport Co. v. Trucking, Unlimited*, 404 U.S. 508, 510, 92 S. Ct. 609, 612, 30 L.Ed.2d 642 (1972); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 103 S. Ct. 2161, 2169, 76 L.Ed.2d 277 (1983).

[6] *McDonald v. Smith*, 472 U.S. 479, 105 S. Ct. 2787, 2791, 86 L.Ed.2d 384 (1985).

[7] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n. 1, 116 S. Ct. 1495, 1501 n. 1, 134 L.Ed.2d 711 (1996).

[8] *See Bieregu v. Reno*, 59 F.3d 1445, 1453-54 (3rd Cir. 1995).

[9] *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S. Ct. 780, 784, 28 L.Ed.2d 113 (1971).

> is one of the highest and most essential privileges of citizenship. . . . [10]

Access to the courts undergirds and strengthens powerful societal interests. It provides compensation for violated rights and interests, it produces psychological benefits of vindication, and it permits a public airing of disputed facts.[11]

The Texas Legislature adopted Section 13.01 of the Texas Medical Liability and Insurance Improvement Act as a means of reducing perceived frivolous medical malpractice claims.[12] However, this Court has consistently rejected the notion that the goal of reducing frivolous litigation justifies making access to the courts unaffordable. *Boddie v. Connecticut* confirmed that the use of cost requirements as a means of preventing frivolous litigation may not override the interest of claimants in obtaining access to the courts.[13] The State of Connecticut argued in *Boddie* that the State's fee and cost requirement for those seeking divorces was justified as a means of preventing frivolous litigation.[14] This argument was rejected as being insufficient to override the interest of the appellants in having access to the courts, this Court pointing out there is no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit.

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[10] 207 U.S. 142, 148, 28 S. Ct. 34, 35, 52 L.Ed. 143 (1907).

[11] *See Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731, 743, 103 S. Ct. 2161, 2170, 76 L.Ed.2d 277 (1983).

[12] *See McGlothlin v. Cullington*, 989 S.W.2d 449, 451 (Tex.App. – Austin, 1999, *pet. den.*).

[13] *Boddie*, 401 U.S. at 382, 91 S. Ct. at 788.

[14] *Id.*, 401 U.S. at 382, 91 S. Ct. at 788.

A State may not use its power to make access to the courts unaffordable for a class of citizens as a means of eliminating or reducing allegedly frivolous claims. In *Lindsey v. Normet*[15] this Court found that a State statute denied equal protection where it required that tenants post a bond on appeal twice the amount of rent expected to accrue pending appellate review. It was argued in *Lindsey* that an Oregon statutory bonding requirement was justified to prevent frivolous appeals. This Court observed:

> The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond.[16]

Mr. Justice Douglas in a partial dissent characterized the double-bond requirement as an "invidious discrimination" at which the Equal Protection Clause was aimed for a legislature to select one class of appellants and placing a more onerous condition on their right to appeal than is placed on other like appellants.[17]

The Texas Court of Appeals did not apply the higher standard of review for determining whether a State statute abridges fundamental constitutional rights under the United States Constitution that was applied by this Court in *Bullock v. Cater*: Any State statute which attempts to abridge a fundamental constitutional right must be

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[15] 405 U.S. 56, 92 S. Ct. 862, 31 L.Ed.2d 36 (1972).

[16] *Id.*, 405 U.S. at 78, 92 S. Ct. at 876.

[17] *Id.*, 405 U.S. at 81, 92 S. Ct. at 878.

closely scrutinized and found *reasonably necessary* to the accomplishment of legitimate State objectives in order to be constitutional.[18]

There must be a showing of *necessity*.[19] It is not sufficient simply to show that there may be some rational basis for such a statute.[20] Instead of applying this standard of review, the Texas Court of Appeals engaged a presumption that the Texas statute was constitutional.

This Court has zealously guarded against State attempts that abridge the Equal Protection and Due Process Clauses by imposing onerous financial barriers or obstacles which inhibit or prevent the exercise of fundamental constitutional rights. For example, the United States Supreme Court held in *Bullock v. Cater* that a Texas state law which created barriers to candidate access to the primary ballot by preventing potential candidates for public office from seeking nomination of their party as a result of their inability to pay a portion of the cost of conducting primaries unlawfully discriminated, violated the Equal Protection Clause, and was unconstitutional.[21] The Texas system fell with unequal weight on candidates according to their economic status and utilized the criterion of ability to pay as a condition to being on the ballot.[22] In *Boddie v. Connecticut* this Court held that the Due Process Clause was violated where the appellants

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[18] 405 U.S. 134, 144, 92 S. Ct. 849, 856, 31 L.Ed.2d 92 (1972).

[19] *Id.*, 405 U.S. at 147, 92 S. Ct. at 858.

[20] *Id.*, 405 U.S. at 142-44, 147, 92 S. Ct. at 855-56, 858.

[21] *Bullock*, 405 U.S. at 149, 92 S. Ct. at 859.

[22] *Id.*

were denied access to the courts in seeking divorces when they were financially unable to pay court costs and fees.[23] *Boddie* recognized that the right to a meaningful opportunity to be heard within the limits of practicality must be protected against denial by particular laws that would operate to jeopardize the right for particular individuals.[24] This Court concluded that a cost requirement may offend due process when it operates to foreclose a particular party's opportunity to be heard in court.[25]

Where fundamental rights and liberties are asserted under the Equal Protection Clause of the United States Constitution, classifications which might invade or restrain them must be strictly scrutinized and carefully confined.[26]

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[23] 401 U.S. at 374-5, 91 S. Ct. at 784.

[24] *Id.*, 401 U.S. at 380-81, 91 S. Ct. at 787.

[25] *Id.*, 401 U.S. at 380, 91 S. Ct. at 787. Also see *Burns v. Ohio*, 360 U.S. 252, 79 S. Ct. 1164, 3 L.Ed.2d 1209 (1959), which invalidated a procedure where cases within the jurisdiction of a state supreme court would not be considered if a person could not afford to pay the filing fee, and *Smith v. Bennett*, 365 U.S. 708, 81 S. Ct. 895, 6 L.Ed.2d 39 (1961), where requiring indigents to pay filing fees before a writ of habeas corpus could be considered in state court was invalidated under the Equal Protection Clause.

[26] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670, 86 S. Ct. 1079, 1083, 16 L.Ed.2d 169 (1966).

CONCLUSION

State statutes that create financial barriers or obstacles to preemptively dismiss lawsuits in the name of reducing frivilous claims have broad chilling implications to fundamental rights arising under the United States Constitution. Such statutes should be given the utmost scrutiny and invalidated when there is no reasonable necessity for their existence.

WHEREFORE, it respectfully is prayed that a writ of certiorari be granted to review the judgment and opinion of the Texas Court of Appeals for the Third District of Texas.

Respectfully submitted,

J. RAY RILEY
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for Petitioner

TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED APRIL 1, 1999

NO. 03-98-00205-CV

Wysonga McGlothlin, Appellant

v.

James R. Cullington, Appellee

APPEAL FROM 345TH DISTRICT COURT OF
TRAVIS COUNTY BEFORE JUSTICES
JONES, KIDD AND POWERS
AFFIRMED – OPINION BY JUSTICE KIDD

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's order: IT IS THEREFORE considered, adjudged and ordered that the order of the trial court is in all things affirmed. It is FURTHER ordered that the appellant, Wysonga McGlothlin, pay all costs relating to this appeal, both in this Court and the court below; and that this decision be certified below for observance.

TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN

NO. 03-98-00205-CV

Wysonga McGlothlin, Appellant

v.

James R. Cullington, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
345TH JUDICIAL DISTRICT NO. 97-01888,
HONORABLE PETER M. LOWRY, JUDGE PRESIDING

Wysonga McGlothlin, appellant, appeals the trial court's dismissal for want of prosecution of her medical negligence claim against Dr. James Cullington, appellee. We will affirm.

BACKGROUND

The resolution of this case depends largely upon the statutory requirements of the Texas Medical Liability and Insurance Improvement Act (the "Act");[1] accordingly, a brief summary of the facts should prove sufficient. As a result of a malignant tumor, Ms. McGlothlin, in two surgical procedures performed by physicians not a party to this suit, had breast tissue removed from and a breast implant inserted into her right breast. After the surgery,

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[1] *See* Tex. Rev. Civ. Stat. Ann. art. 4590i (West Supp. 1999).

Ms. McGlothlin experienced swelling around her right breast and under her arm, and it was necessary that the liquid causing the swelling be aspirated regularly. During this recovery period, Ms. McGlothlin's regular surgeon temporarily left town and referred Ms. McGlothlin to a colleague, Dr. Cullington. During the visit, Dr. Cullington, while attempting to aspirate Ms. McGlothlin's swollen breast, allegedly punctured her breast implant, causing the breast to flatten, which necessitated further reconstructive surgery. Ms. McGlothlin filed suit against Dr. Cullington on February 18, 1997.

The Act requires Ms. McGlothlin, as plaintiff in a medical malpractice lawsuit, to comply with a number of prerequisites in order to preserve her claim. The substance of this dispute concerns the specific requirements of section 13.01,[2] the relevant portions of which provide:

> (a) In a health care liability claim, a claimant *shall*, not later than the 90th day after the date the claim is filed:
>
> (1) file a separate *cost bond in the amount of $5,000* for each physician or health care provider named by the claimant in the action;
>
> (2) place *cash in an escrow account in the amount of $5,000* for each physician or health care provider named in the action; *or*
>
> (3) *file an expert report* for each physician or health care provider with respect to whom a cost bond has not been filed and cash in lieu of

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[2] *See* Tex. Rev. Civ. Stat. Ann. art. 4590i, § 1301 (West Supp. 1999).

> the bond has not been deposited under Subdivision (1) or (2) of this subsection.

Tex. Rev. Civ. Stat. Ann. art 4590i, § 13.01(a) (West Supp. 1999) (emphasis added). Should a plaintiff fail to comply with one of the listed requirements in section 13.01(a), the court *shall* enter an order that:

> (1) requires the filing of a $7,500 cost bond with respect to the physician or health care provider not later than the 21st day after the date of the order; *and*
>
> (2) provides that if the claimant fails to comply with the order, *the action shall be dismissed for want of prosecution*. . . .

Id. (b)(1), (2) (emphasis added).

On April 1, 1997, forty-two days after Ms. McGlothlin filed her lawsuit, the Texas Commissioner of Insurance found Dr. Cullington's insurance carrier, who was responsible for his defense, to be impaired, and the suit was automatically stayed for six months.[3] Ninety days after the automatic six-month stay lapsed, on January 30, 1998, Dr. Cullington filed a motion to increase security pursuant to the Act asking the trial court to compel Ms. McGlothlin to file a $7,500 cost bond, or to dismiss the case in the event the bond was not filed. Ms. McGlothlin, in a response to Dr. Cullington's motion filed on February 26, 1998, claimed by affidavit that she lacked the financial ability to either pay the cost bond or, alternatively, to

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[3] *See* Tex. Ins. Code Ann. art. 21.28-C, § 17 (West Supp. 1999).

retain an expert to provide an expert report on causation.[4] On March 12, 1998, the court rendered an order compelling Ms. McGlothlin to file a $7,500 cost bond within twenty-one days. When no cost bond was filed, the court rendered an order on April 13, 1998 dismissing the cause for want of prosecution. Because Ms. McGlothlin failed to comply with the requirements of section 13.01(a) and (b), the court had no discretion but to dismiss her claim pursuant to the statute. Ms. McGlothlin appeals, arguing that the requirements of section 13.01 of the Act (1) violate the Due Process clause of the United States Constitution, (2) violate the Open Courts Guarantee of the Texas Constitution, and (3) act as a "special law" in violation of Article II, Section 56, of the Texas Constitution. We do not address whether the trial court's dismissal was error, but whether the statute, as applied to Ms. McGlothlin, is unconstitutional.

DISCUSSION

We begin by noting that a statute is presumed constitutional. *See Enron Corp. v. Spring Indep. Sch. Dist.*, 922

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[4] Ms. McGlothlin states in her affidavit:

> It is my understanding such an expert report would have to be a physician because Dr. Cullington, the defendant in this case, is a physician. *It is my further understanding, based upon information from my attorney, that an expert physician would likely require that I pay him a retainer of at least $2,000.00 in order to engage the expert and obtain a liability report from him.* I do not have the financial ability to pay such a large sum of money and therefore could not obtain an expert's report.

S.W.2d 931, 934 (Tex. 1996). The wisdom or expediency of a law is for the legislature to determine, not this Court. *See id.* Furthermore, the party challenging the constitutionality of a statute bears the burden of demonstrating that the enactment fails to meet constitutional requirements. *Id.*

Due Process

Ms. McGlothlin initially contends that the cost bond and expert report requirements of article 4590i, section 13.01 violate the due process protections of the United States and Texas constitutions. *See* U.S. Const. amend. XIV; Tex. Const. art. I, § 13, art. III, § 56. Ms. McGlothlin argues that her due process rights were violated because she was not able to pursue her injury claim due to the onerous cost bond and expert report requirements of section 13.01; therefore, the statute unconstitutionally restricted the initiation of her medical malpractice claim.[5] When determining whether a statute denies a constitutional right to a litigant, we analyze the statute using the criteria established by *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983). *Sax* sets out a two-part test: (1) the litigant must show that a cognizable common-law cause of action is being restricted; and (2) the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute. *Sax*, 648 S.W.2d at 666.

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[5] We will discuss Ms. McGlothlin's due process challenges under the Texas and United States constitutions together, as our analysis is dispositive of both points.

Negligent infliction of injury by a medical practitioner is an undisputed cause of action under Texas common law. *See Humphreys v. Roberson*, 83 S.W.2d 311 (Tex. 1935); *Bowles v. Bourdon*, 213 S.W.2d 713 (Tex. Civ. App. – Galveston 1948), *aff'd*, 148 S.W.2d 779 (Tex. 1949). Thus, the constitutionality of the cost bond and expert report provisions turns on whether these requirements are unreasonable and arbitrary when balanced against the purposes of the Act.

Passed in 1977, the original Act sought to address what the legislature described as "a medical malpractice insurance crisis in the State of Texas." *See* Medical Liability and Insurance Improvement Act, 65th Leg., R.S., ch. 817, § 1.02(a)(5), 1977 Tex. Gen. Laws 2040 (Tex. Rev. Civ. Stat. Ann. art 4590i, since amended). The legislature added section 13.01 to the Act in 1993. *See* Act of May 25, 1993, 73d Leg., R.S., ch. 625, § 3, 1993 Tex. Gen. Laws 2347-49 (Tex. Rev. Civ. Stat. Ann. art 4590i, § 13.01, since amended).[6] The cost bond and expert report provisions of section 13.01 were enacted "to address the perceived problem that litigants were filing unmeritorious claims against medical practitioners which were not adequately

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[6] In its original form, entitled **Affidavit or Cost Bond**, section 13.01 required the affidavit of the plaintiff or plaintiff's counsel attesting to an obtained written opinion of an expert to be filed within ninety days of the commencement of the action, or, in the alternative, a $2,000 cost bond. Tex. Rev. Civ. Stat. Ann. art. 4590i, § 13.01(a), (b) (West Supp. 1999). Should the plaintiff fail to comply with either of these alternatives, the cost bond, upon motion, would be increased to $4,000; should another thirty days pass without the filing of an expert report or the $4,000 cost bond, the action must be dismissed by the court without prejudice. *Id.* § 13.01(c).

investigated in a timely manner. This . . . led doctors to settle such suits, regardless of the merits, and also to expend great amounts of money on defending against ultimately 'frivolous claims.' " *Horsley-Layman v. Angeles*, 968 S.W.2d 533, 537 (Tex. App. – Texarkana 1998, no pet) (citing House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 971, 74th Leg., R.S. (1995)). Thus, the legislature sought to address the important purposes of (1) keeping down medical insurance costs, and thus health care costs, by reducing frivolous medical malpractice claims, and (2) allowing a defendant physician to recoup some portion of court costs from a successful defense. The question for this Court is whether section 13.01 constitutes an unreasonable and arbitrary means to achieve these purposes.

Dr. Cullington relies upon two cases for the proposition that the *Sax* balancing test favors the constitutionality of the cost bond and expert report requirements of section 13.01. *See Horsley-Layman v. Angeles*, 968 S.W.2d 533 (Tex. App. – Texarkana 1998, no writ); *Odak v. Arlington Memorial Hosp.*, 934 S.W.2d 868 (Tex. App. – Fort Worth 1996, writ denied). Both *Horsley-Layman* and *Odak* addressed and upheld the constitutionality of section 13.01 as it existed under the 1993 statute. *See Horsley-Layman*, 968 S.W.2d at 537; *Odak*, 934 S.W.2d at 872.

The *Horsley-Layman* court focused on the lack of evidence indicating why the requirements of a cost bond or expert report would result in an unreasonable financial burden above the costs of a medical malpractice claim in general. *See Horsley-Layman*, 968 S.W.2d at 537. The court noted that the appellants "never asserted that the appellants failed to file an expert report as to Dr. Angeles

because they did not have the financial resources to procure such a report." *Id.* The *Odak* court, in overruling appellant's Open Courts challenge, also focused on the lack of any evidence that the options presented the plaintiff in initiating her malpractice claim under section 13.01 were unreasonable or arbitrary. *See Odak,* 934 S.W.2d at 872. The court stated "[I]f the expense of obtaining an expert report is too prohibitive for both the claimant and the attorney, they will be unable to pursue a claim requiring expert testimony regardless of whether they file the affidavit."[7] *Id.* However, as mentioned, both *Horsley-Layman* and *Odak* upheld the constitutionality of the 1993 statute when section 13.01 required only a $2,000 cost bond or affidavit by the attorney.[8]. In doing so, *Odak,* specifically states "were the bond set at an arbitrary, unreasonably high amount, our analysis might be different." *Odak,* 934 S.W.2d at 872. Because the requirements of section 13.01 have been heightened by the legislature, we will examine the Open Courts challenge to section 13.01 in its present form.

The Texas Open Courts Guarantee

Article I, section 13 of the Texas constitution provides:

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[7] Texas law has traditionally required expert testimony to establish causation in medical malpractice actions. *See Hart v. Van Zandt,* 397 S.W.2d 791, 792 (Tex. 1965) (in all medical malpractice claims, negligence and proximate cause must be proven by expert testimony).

[8] *See* note 6, *infra.*

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. *All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.*

Tex. Const. art. I. § 13 (emphasis added). This clause, commonly referred to as the "Open Courts Guarantee," acts as an additional due process guarantee granted in the Texas constitution, prohibiting legislative bodies from arbitrarily withdrawing all legal remedies from anyone having a well-defined cause of action under the common law. *See Sax*, 648 S.W.2d at 664. Texas courts have zealously guarded the rights of litigants to pursue their claims in court. *See* 12A Tex. Jur. 3d *Constitutional Law* § 171, 172 (1986) (listing cases invalidating statutes that violate the Open Courts Guarantee). The right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally guaranteed right to redress. In applying the test, we consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected. *Sax*, 648 S.W.2d at 666.

In examining section 13.01 according to these standards, we first note that the statute offers litigants two means of preserving a malpractice claim: (1) a cost bond or cash deposit; or (2) an expert report.[9] The required

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[9] Section 13.01 defines "expert report" as a

> written report by an expert that provides a fair summary of the expert's opinions as of the date of the

amount of the cost bond significantly increased in 1995, more than doubling. Moreover, the 1995 statute now requires an actual expert report rather than a mere affidavit stating that a written expert opinion has been procured. However, we do not reach an analysis of the constitutionality of the new section 13.01 because Ms. McGlothlin has failed to provide sufficient evidence that these requirements actually acted to keep her from pursuing her claim, as was her burden. *See Enron Corp.*, 922 S.W.2d at 934.

Ms. McGlothlin gives no reason in the record for not complying with the Act within the initial 90 days after filing suit.[10] We thus have no indication that Ms. McGlothlin ever attempted to comply with the statute. She claims by affidavit that, "based upon information from my attorney," experts require a $2,000 retainer to furnish a report. This is, of course, hearsay, and no evidence that a $2,000 threshold actually exists. The statute clearly implies the expert report is but a minimal requirement, and includes numerous allowances for plaintiffs

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> report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

Tex. Rev. Civ. Stat. Ann. art. 4590i, § 13.01(r)(6) (West Supp. 1999).

[10] Ms. McGlothlin's affidavit claiming financial inability was filed on February 26, 1998, in response to Dr. Cullington's motion to increase security, more than one year after she originally brought suit. Thus, she was given substantially more than the statutory 90-day period in which to procure a report or file a cost bond.

filing an expert report.[11] Finally, the affidavit makes no mention of any actual attempt to obtain an expert report, only some perceived financial barrier. Ms. McGlothlin's failure to comply could be due as much to oversight or mistake as to actual financial inability. Accordingly, Ms. McGlothlin's affidavit is wholly insufficient to establish proof that section 13.01 is unconstitutional as applied to her. We overrule her due process challenges.

Special Law

Ms. McGlothlin additionally claims that section 13.01 violates article III, section 56 of the Texas constitution, which states "in all other cases where a general law can be made applicable, no local or special law shall be

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[11] Section 13.01 contains several subsections defining the nature and use of an "expert report," including:

> Section 13.01(j): "[N]othing in this section shall be construed to require the filing of an expert report regarding any issue other than an issue relating to liability or causation."
>
> Section 13.01(k): "[N]otwithstanding any other law, an expert report filed under this section: (1) is not admissible in evidence *by a defendant;* (2) shall not be used in a deposition, trial, or other proceeding; and (3) shall not be referred to *by a defendant* during the course of the action for any purpose."
>
> Section 13.01(l): "[A] court shall grant a motion challenging the adequacy of an expert report *only if it appears to the court, after hearing, that the report does not represent a good faith effort to comply with the definition of an expert report* in Subsection(r)(6) of this section."

Tex. Rev. Civ. Stat. Ann. art. 4590i, § 13.01(j), (k), (l) (West Supp. 1999) (emphasis added).

enacted." Tex. Const. art. III, § 56. She contends that section 13.01 creates a separate class of physicians protected from suit by section 13.01. A statute is not special or local if it operates on a subject in which people at large are interested. *See Langdeau v. Bouknight*, 344 S.W.2d 435, 441 (Tex. 1961). Having already discussed the important state interests addressed by the legislature in the Act, we find this point to be without merit.

CONCLUSION

Because the record fails to reflect any evidence of Ms. McGlothlin's actual financial inability to comply with the requirements of section 13.01, she has not carried her burden of demonstrating that the statute fails to meet constitutional requirements. Moreover, because section 13.01 addresses the important state interest of containing medical malpractice insurance costs, it is not a special law under the Texas constitution. We overrule appellant's points of error and affirm the order of the trial court.

/s/ _____
Mac Kidd, Justice

Before Justices Jones, Kidd and Powers*

Affirmed

Filed: April 1, 1999

Publish

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* Before John E. Powers, Senior Justice (retired), Third Court of Appeals, sitting by assignment. *See* Tex. Gov't Code Ann. § 74.003(b) (West 1998).

NO. 9701888

WYSONGA McGLOTHLIN, Plaintiff, v. JAMES R. CULLINGTON, Defendant.	§ § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 345TH JUDICIAL DISTRICT

ORDER OF DISMISSAL

ON THE 27th day of February, 1998, a hearing was held on Defendant's Motion to Increase Security and after taking the matter under advisement and considering the authorities cited by Defendant and by Plaintiff, an Order granting Defendant's Motion to Increase Security was duly entered on March 12, 1998. Therein, it was provided that Plaintiff was required to file a $7,500 cost bond not later than 21 days after the date of the Order and in the event she failed to do so, the case would be dismissed, subject to reinstatement, all in accordance with § 13.01, Art. 4590i.

After the expiration of 21 days, Plaintiff has not filed the required $7,500 cost bond and, therefore, this case should be dismissed, subject to reinstatement. It is accordingly,

ORDERED that this lawsuit is DISMISSED for want of prosecution, subject to reinstatement in accordance with Subsection (c) of 13.01, Art. 4590i.

SIGNED this 13th day of April, 1998.

/s/ Pete Lowry
JUDGE PRESIDING

NO. 9701888

WYSONGA McGLOTHLIN, Plaintiff, v. JAMES R. CULLINGTON, Defendant.	§ § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 345TH JUDICIAL DISTRICT

ORDER GRANTING DEFENDANT'S MOTION TO INCREASE SECURITY

TO THE HONORABLE JUDGE OF SAID COURT:

ON THIS DAY CAME on to be considered the Motion of James R. Cullington, M.D., Defendant herein, and after receiving evidence and hearing argument of counsel, the Court finds:

1. That Plaintiff has failed, as to the moving Defendant, within ninety (90) days after the date this action was commenced to either file a report by a qualified expert, or to deposit cash ($5,000), or post an appropriate cost bond ($5,000), all as required by § 13.01 of the Medical Liability Insurance Improvement Act of Texas, Art. 4590i;

2. That Defendant's Motion should be GRANTED; and

3. That in accordance with the further provisions of § 13.01, Art. 4590i, Plaintiff should be ORDERED to post a $7,500 cost bond or, failing that, this case should be DISMISSED for want of prosecution.

IT IS ACCORDINGLY, ORDERED, that Plaintiff is required to file a $7,500 cost bond not later than twenty-

one (21) days of the date of this Order. It is further ORDERED that in the event Plaintiff fails to file the $7,500 cost bond, this case shall be DISMISSED for want of prosecution with respect to the moving Defendant, subject to reinstatement in accordance with applicable rules of civil procedure and Subsection (c) of § 13.01, Art. 4590i.

SIGNED this 12th day of March, 1998.

/s/ Pete Lowry
JUDGE PRESIDING

No. 9701888

WYSONGA McGLOTHLIN,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	TRAVIS COUNTY, TEXAS
v.	§	
JAMES R. CULLINGTON,	§	345th JUDICIAL DISTRICT
Defendant.	§	

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

COMES NOW, WYSONGA McGLOTHLIN, plaintiff, and complains of **JAMES R. CULLINGTON.** In support of her cause of action against the defendant, plaintiff would show this honorable Court and Jury the following:

I.

Plaintiff, **WYSONGA McGLOTHLIN,** is an individual residing in Travis County, Texas.

Defendant, **JAMES R. CULLINGTON,** is an individual who upon information and belief resides in Travis County, Texas, having an address at 1010 West Ninth Street, Austin, Texas 78703.

II.

In February, 1995, the Plaintiff went to the Defendant for medical treatment while recovering from reconstruction surgery after removal of a malignant tumor in her breast. The reconstruction surgery included placement of a breast implant in Plaintiff's breast.

While under the care and supervision of the Defendant, the Defendant punctured the Plaintiff's recently implanted breast implant. The Defendant acted in a careless, reckless and negligent manner in providing medical treatment to the Plaintiff. As a proximate result of such carelessness, recklessness, and negligence, the Plaintiff was severely and painfully injured. The injury to the Plaintiff was incredibly painful and caused the Plaintiff mental anguish, worry and depression.

In particular, the Defendant negligent acts or omissions included but are not necessarily limited to the following:

a. failing to determine where to insert a needle into the Plaintiff's breast in a manner that would not puncture Plaintiff's breast implant;

b. failing to properly observe where he was inserting such needle; and

c. failing to pay attention to where he was inserting such needle.

Because of the wrongful acts of the Defendant the Plaintiff has suffered losses which the Jury should consider as follows:

a. Pecuniary loss and damages;

b. Loss of companionship and society;

c. Mental anguish;

d. Medical expenses;

e. Loss of wages, sick leave, and/or vacation time; and

f. Punitive damages.

III.

In the alternative, the Defendant's actions constituted an assault and battery upon the Plaintiff, proximately causing the injuries and damages set forth above.

IV.

In the alternative, the Defendant's actions constituted a wrongful trespass into the body of the Plaintiff, proximately causing the injuries and damages set forth above.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Defendant be cited to appear and answer herein, and upon final hearing that the Plaintiff have judgment against the Defendant in a sum which is within the jurisdictional limits of this Court, and for all of her damages as set forth above. Plaintiff further prays for pre-judgment interest as provided by law, or as otherwise provided by law and for post-judgment interest. Plaintiff further prays for such other further relief, both special and general, to which Plaintiff may be justly entitled at law or in equity.

Respectfully submitted,

J. RAY RILEY & ASSOCIATES

By: /s/ J. Ray Riley

J. Ray Riley, Tex. No. 16927000
Chelita C. Riley, Tex. No. 00796061
West U. Plaza
6213 Edloe Street
Houston, Texas 77005
Telephone: (713) 667-1170
Telecopier: (713) 667-5945

ATTORNEYS FOR PLAINTIFF

Certificate of Service

The undersigned certifies that he served a copy of the foregoing document on the defendant in this cause by service upon his attorneys of record, Fred E. Davis, Davis & Davis, P.C., 9442 Capital of Texas Highway, Arboretum Plaza I, Suite 950, Austin, Texas 78759, fax number 512/343-0121, in accordance with the Texas Rules of Civil Procedure on the 26th day of February, 1998.

/s/ J. Ray Riley
J. Ray Riley

1319A1D7.SAM

No. 9701888

WYSONGA McGLOTHLIN,	§	IN THE DISTRICT
	§	COURT OF TRAVIS
	§	COUNTY, TEXAS
Plaintiff,	§	
	§	345th JUDICIAL
v.	§	DISTRICT
	§	
JAMES R. CULLINGTON,	§	
	§	
Defendant.	§	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO INCREASE SECURITY

TO THE HONORABLE COURT AFORESAID:

The Plaintiff, **WYSONGA McGLOTHLIN**, opposes the Defendant's Motion to Increase Security on the following grounds:

Plaintiff Claims Constitutional Right of Access to the Courts Under the Constitutions of Texas and the United States

1. The Defendant's Motion to Increase Security is grounded on the Medical Liability and Insurance Improvement Act (the "Act"), Tex.Rev.Civ.Stat.Ann., art. 4590i, Section 13.01 (Vernon Supp. 1998). As applied to the Plaintiff in this case, Section 13.01 of the Act is unconstitutional under article I, Section 13, of the Texas Constitution and under the Fourteenth Amendment of the United States Constitution.

2. Section 13, article I, of the Texas Constitution provides:

> "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

This provision purely and simply contemplates that the Texas Legislature shall not place barriers to the halls of justice before persons who have been injured at the hands of others.

3. The Fourteenth Amendment to the United States Constitution guarantees that each citizen of the United States shall be guaranteed equal protection under the law and shall receive due process under the law. Equal protection contemplates that barriers will not be erected to preclude citizens from enforcing rights and obtaining remedies in the halls of justice in order to protect one particular class of citizens or industry. Due process under the law contemplates that citizens shall have the full opportunity to seek redress in the halls of justice for injuries done them.

Facts Before the Court

4. In the case now before the Court, the plaintiff received injury at the hands of the defendant who is a physician. The plaintiff had received a breast implant following removal of a malignant tumor from her breast. The surgeon making the implant temporarily placed the plaintiff under the care of the defendant. To reduce the painful buildup of bodily fluids within the plaintiff's breast, the defendant was supposed to insert the needle of a syringe and remove excess fluids. Instead, the defendant punctured the plaintiff's breast implant, causing the

implant and the plaintiff's breast to go flat. See the plaintiff's affidavit attached hereto and incorporated herein by reference for all purposes.

5. The plaintiff has brought suit against the defendant to recover her damages under the theories of assault and battery, trespass and negligence. See Plaintiff's First Amended Original Petition attached hereto and incorporated herein by reference for all purposes.

7. Suit was brought against the defendant on February 18, 1997. On April 1, 1997 the Texas Commissioner of Insurance found that the defendant's insurance carrier providing his defense was impaired, and this proceeding was therefore automatically stayed for six months. See the defendant's Notice of Automatic Stay of Proceedings on file herein.

Unconstitutional Barriers Invoked By Defendant

8. A month ago the defendant filed his motion asking the Court to order the plaintiff to file a $7,500 cost bond and asking the Court to dismiss this case if a $7,500 cash bond is not filed. The defendant's motion is ground on the Medical Liability and Insurance Improvement Act, Tex.Rev.Civ.Stat.Ann., art. 4590i, Section 13.01 (Vernon Supp. 1998).

9. As shown by the plaintiff's attached affidavit, the plaintiff does not have the ability to comply with Section 13.01 in any respect. She cannot afford to make either a $7,500 cash deposit or the base $5,000 cash deposit provided for in Section 13.01(a)(2). She cannot afford to make either a $7,500 cost bond or the base $5,000 cost bond

provided for in Section 13.01(a)(1). She cannot afford to pay an expert physician the customary non-refundable expert retainer of anywhere from $2,000 to $5,000 that is generally required to secure such services.[1]

10. It regularly has been held that barriers which deny persons access to the courts of the State of Texas are unconstitutional. For example, in *Texas Ass'n. of business v. Texas Air Control Bd.*, 852 S.W.2d 440, 449-50 (Tex. 1993), the Texas Supreme Court held that prepayment and forfeiture provisions of the Clean Air Act and the Water Code were unconstitutional and that the Texas Legislature cannot require prepayment of administrative penalties as a prerequisite to judicial review. In *EnRe Corp. v. Railroad Comm. of Texas*, 852, S.W.2d 661 (Tex.App. – Austin 1993, no writ history), the Court of Appeals held that the Administrative Procedure and Texas Register Act's requirement that a cash deposit or a cost bond be made to cover the cost of an assessed penalty before judicial review could be obtained was unconstitutional. The Court observed that the apparent rationale for the prepayment and forfeiture provisions was to deter appeals and that rationale did not comport with the open courts provision of the Texas Constitution.

11. The Texas Supreme Court has found unconstitutional several provisions of the Medical Liability and Insurance Improvement Act in the past. In *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), the Court held that

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[1] Since the defendant is a physician, Section 14.01(a) of the Act restricts the plaintiff to securing the expert opinion of another physician, a requirement that the plaintiff is financially unable to afford. See paragraph 9 of plaintiff's affidavit.

placing a dollar limitation on medical malpractice damages in Sections 11.02 and 11.03 of art. 4590i, Tex.Rev.Civ.Stat.Ann., violated the open courts provision of the Texas Constitution.

12. There is only a single appellate case reported in Texas that has considered the constitutionality of Section 13.01 of the Act. The facts of that case are not analogous to the facts in the present case. In *Odak v. Arlington Memorial Hospital Foundation*, 934 S.W.2d 868 (Tex.App. – Ft. Worth, 1996, writ denied), the plaintiff never claimed that the requirements of Section 13.01 were onerous due to cost or offered any reason for ignoring the court's repeated requests for a response to issues raised by Section 13.01. The district court thus dismissed the plaintiff's case, and only then did the plaintiff raise an issue of unconstitutionality in a motion for new trial. The court's finding that Section 13.01 was constitutional under the open courts provision of the Texas Constitution was made in the absence of any facts showing its impact on the plaintiff. *Such is not the case here whether the impact is clear, prejudicial, and would deny the plaintiff access to the courts.* In addition, the Court in *Odak* was not required to address federal rights of equal protection and due process guaranteed by the Fourteenth Amendment of the United States Constitution.

13. In conclusion, the Court should find that, as applied to the plaintiff in her financial circumstances and under her pled causes of action, application of Section 13.01 of the Act is unconstitutional under the open courts provision of the Texas Constitution and under the equal protection and due process requirements of the United States Constitution.

14. A proposed order denying the Defendant's motion is attached.

WHEREFORE, premises considered, the Plaintiff prays that the Court deny the Defendant's Motion to Increase Security.

J. RAY RILEY & ASSOCIATES
By: /s/ J. Ray Riley
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ATTORNEYS FOR PLAINTIFF

Certificate of Service

The undersigned certifies that he served a copy of the foregoing document on the defendant in this cause by service upon his attorneys of record in accordance with the Texas Rules of Civil Procedure on the 26th day of February, 1998.

/s/ J. Ray Riley
J. Ray Riley

[SEAL] THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

July 15, 1999

Mr. J. Ray Riley
J. Ray Riley & Associates
West U. Plaza
6213 Edloe Street
Houston, TX 77005

Mr. Fred E. Davis
Davis & Davis
P. O. Box 1588
Austin, TX 78767

RE: Case Number 99-0440
Court of Appeals Number: 03-98-00205-CV
Trial Court Number: 9701888

Style: WYSONGA McGLOTHLIN
v.
JAMES R. CULLINGTON

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Tanya R. Hunter
Tanya R. Hunter, Deputy Clerk

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza

[Texas Medical Liability and Insurance Improvement Act, Tex. Rev. Civ. Stat. Ann. art. 4590i (West Supp. 1999)]

SUBCHAPTER M. PROCEDURAL PROVISIONS

Cost Bond, Deposit, and Expert Report

Sec. 13.01. (a) In a health care liability claim, a claimant shall, not later than the 90th day after the date the claim is filed:

(1) file a separate cost bond in the amount of $5,000 for each physician or health care provider named by the claimant in the action;

(2) place cash in an escrow account in the amount of $5,000 for each physician or health care provider named in the action; or

(3) file an expert report for each physician or health care provider with respect to whom a cost bond has not been filed and cash in lieu of the bond has not been deposited under Subdivision (1) or (2) of this subsection.

(b) If, as to a defendant physician or health care provider, an expert report, cost bond, or cash in lieu of bond has not been filed or deposited within the period specified by Subsection(a) or (h) of this section, the court, on the motion of the affected physician or health care provider, shall enter an order that:

(1) requires the filing of a $7,500 cost bond with respect to the physician or health care provider not later than the 21st day after the date of the order; and

(2) provides that if the claimant fails to comply with the order, the action shall be dismissed for want of prosecution with respect to the physician or health care

provider, subject to reinstatement in accordance with the applicable rules of civil procedure and Subsection (c) of this section.

(c) Before a claim that has been dismissed under Subsection (b)(2) of this section may be reinstated, the claimant must pay the costs of court incurred by the defendant before the dismissal and file a $7,500 cost bond for each defendant physician or health care provider.

(d) Not later than the later of the 180th day after the date on which a health care liability claim is filed or the last day of any extended period established under Subsection (f) or (h) of this section, the claimant shall, for each physician or health care provider against whom a claim is asserted:

(1) furnish to counsel for each physician or health care provider one or more expert reports, with a curriculum vitae of each expert listed in the report; or

(2) voluntarily nonsuit the action against the physician or health care provider.

(e) If a claimant has failed, for any defendant physician or health care provider, to comply with Subsection (d) of this section within the time required, the court shall, on the motion of the affected physician or health care provider, enter an order awarding as sanctions against the claimant or the claimant's attorney:

(1) the reasonable attorney's fees and costs of court incurred by that defendant;

(2) the forfeiture of any cost bond respecting the claimant's claim against that defendant to the extent necessary to pay the award; and

(3) the dismissal of the action of the claimant against that defendant with prejudice to the claim's refiling.

(f) The court may, for good cause shown after motion and hearing, extend any time period specified in Subsection (d) of this section for an additional 30 days. Only one extension may be granted under this subsection.

(g) Notwithstanding any other provision of this section, if a claimant has failed to comply with a deadline established by Subsection (d) of this section and after hearing the court finds that the failure of the claimant or the claimant's attorney was not intentional or the result of conscious indifference but was the result of an accident or mistake, the court shall grant a grace period of 30 days to permit the claimant to comply with that subsection. A motion by a claimant for relief under this subsection shall be considered timely if it is filed before any hearing on a motion by a defendant under Subsection (e) of this section.

(h) The affected parties may agree to extend any time period specified in Subsection (a) or (d) of this section. An agreement under this subsection is binding and shall be honored by the court if signed by the affected parties or their counsel and filed with the court.

(i) Notwithstanding any other provision of this section, a claimant may satisfy any requirement of this section for filing an expert report by filing reports of separate experts regarding different physicians or health care providers or regarding different issues arising from the conduct of a physician or health care provider, such

as issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider.

(j) Nothing in this section shall be construed to require the filing of an expert report regarding any issue other than an issue relating to liability or causation.

(k) Notwithstanding any other law, an expert report filed under this section:

(1) is not admissible in evidence by a defendant;

(2) shall not be used in a deposition, trial, or other proceeding; and

(3) shall not be referred to by a defendant during the course of the action for any purpose.

(l) A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent a good faith effort to comply with the definition of an expert report in Subsection (r)(6) of this section.

(m) On the claimant's compliance with the requirements of Subsection (d) of this section:

(1) any cost bond filed or cash deposited in an escrow account by the claimant under this section shall be released;

(2) the claimant, the claimant's counsel, and any surety have no liability on the cost bond or cash deposit; and

(3) an execution shall not be issued on the cost bond or cash deposit.

(n) If a claimant nonsuits a health care liability claim against a physician or health care provider before filing a cost bond and seeks to refile the same or a similar health care liability claim against the physician or health care provider, the claimant shall file a $7,500 cost bond for each previously nonsuited physician or health care provider at the time of the filing of the health care liability claim. If the claimant fails to file the $7,500 cost bond for each physician or health care provider, on motion and hearing the court shall order the filing of the cost bond and the claimant shall pay the movant reasonable attorney's fees incurred in obtaining relief under this subsection.

(o) Notwithstanding any other provision of this section, a claimant who is proceeding without an attorney and who is unable to afford a cost bond or cash deposit may, in lieu of a cost bond or cash deposit, file an affidavit in the same form required for an affidavit in lieu of security for costs under the Texas Rules of Civil Procedure.

(p) In the event of a conflict between this section and another law, including a rule of procedure or court rule, this section controls to the extent of the conflict.

(q) Notwithstanding the provisions of Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this section. The district courts and statutory county courts in a county may not adopt local rules in conflict with this section.

(r) In this section:

(1) "Affected parties" means the claimant and the physician or health care provider who are directly affected by an act or agreement required or permitted by this section and does not include other parties to an action who are not directly affected by that particular act or agreement.

(2) "Claim" means a health care liability claim.

(3) "Claimant" means a party who files a pleading asserting a claim. All plaintiffs claiming to have sustained damages as the result of the bodily injury or death of a single person are considered to be a single claimant.

(4) "Defendant" means a physician or health care provider against whom a health care liability claim is asserted. The term includes a third-party defendant, cross-defendant, or counterdefendant.

(5) "Expert" means:

(A) with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 14.01(a) of this Act; or

(B) with respect to a person giving opinion testimony about a nonphysician health care provider, an expert who has knowledge of accepted standards of care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim.

(6) "Expert report" means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable

standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

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March 10, 1998

Re: No. 9701888, *McGlothlin v. Cullington,*
345th District Court,
Travis County, Texas

Faxed: 512/473-9549

Honorable Peter M. Lowry
Judge, 261st Judicial District Court
P.O. Box 1748
1000 Guadalupe Street
Austin, Texas 78767

Dear Judge Lowry:

On February 27, 1998, a hearing was held on the Defendant's Motion to Increase Security based on section 13.01 of the Texas Medical Liability and Insurance Improvement Act (Article 4590i, Tex.Civ.Stat.Ann.). Plaintiff's written response included her affidavit concerning financial inability to comply with the requirements of Section 13.01. Mr. Fred Davis, representing the Defendant, sent the Court a written reply in the form of a letter, dated March 3, 1998. This letter responds to Mr. Davis' comments.

The substance of the Defendant's reply is that litigants suing doctors should demonstrate the soundness of their case by "putting their money where their mouth is" (page 3). The writers of the Texas Constitution did not have such a barrier or burden in mind when they wrote Section 13, article I, which reads in part:

> *"All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."*

Nor is this barrier or burden to be found in the Fourteenth Amendment to the United States Constitution which reads in part:

> *"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."*

The right of access to the courts is a fundamental constitutional right. *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977). The right of access to the courts was amply demonstrated in *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971), which held that the Due Process Clause was violated when the appellants were denied access to the courts in seeking divorces when they were financially unable to pay in advance court costs and fees. The United States Supreme Court recognized that the right to a meaningful opportunity to be heard within the limits of practicality must be protected against denial by particular laws that would operate to jeopardize the right for particular individuals. The Court concluded that a

cost requirement may offend due process when it operates to foreclose a particular party's opportunity to be heard in court. In *Boddie,* the State of Connecticut argued that its fee and cost requirement was justified as a means of preventing frivolous litigation. The Supreme Court rejected this argument as being insufficient to override the interest of the appellants in having access to the courts. The Court pointed out there was no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit.[1]

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[1] Your Honor may recall that at the February 27 hearing this writer mentioned he had never encountered a requirement that security be posted as a condition to seeking relief in any federal or state courts. Footnote 9 of the *Boddie* case referred to and distinguished a 1949 case involving such a requirement. In *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221 (1949), where the ultimate question was whether a federal court sitting in diversity was required to apply a forum state statute, the United States Supreme Court found constitutional a New Jersey statute that required a less than five percent owner of stock to post security for costs and attorney's fees before pursuing a stockholder's derivative action against corporate officers and directors. The rationale was that corporations are wholly artificial creations of the state, that the state has wide powers in regulating corporations and litigations of a fiduciary nature, and that a stockholder who brings a derivative action assumes a fiduciary position as representative of a class such that: "The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity." None of these distinguishing issues are present in the case at bar. Moreover, the concepts of due process and equal protection under the law have traveled generations since *Cohen* in 1949 as demonstrated by subsequent United States Supreme Court decisions, including *Burns v. Ohio,* 360 U.S. 252, 79 S. Ct. 1164 (1959) which invalidated a procedure where cases within the jurisdiction of a state supreme court would not be considered if

Where fundamental rights and liberties are asserted under the Equal Protection Clause of the United States Constitution, classifications which might invade or restrain them must be strictly scrutinized and carefully confined. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 93 S. Ct. 1278 (1973); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 86 S. Ct. 1079 (1966). Thus, a Texas state law that created barriers to candidate access to the primary ballot by preventing potential candidates for public office from seeking nomination of their party as a result of their inability to pay a portion of the cost of conducting primaries unlawfully discriminated against the candidates thus excluded and was a denial of equal protection and unconstitutional. *Bullock v. Cater,* 405 U.S. 134, 92 S. Ct. 849 (1972). The United States Supreme Court found that the very size of fees imposed under the Texas system gave it a *patently exclusionary character* where the filing fees for a state representative ranged from $150 to $600, for a state senator could reach a maximum of $1,000, for a statewide office was $1,000, and in some instances could reach as much as $8,900, notwithstanding that the purpose of the fees was to help finance the primary elections. The Texas system fell with unequal weight on candidates according to their economic status and utilized the criterion of ability to pay as a condition to being on the ballot. The same can be said of Section 13.01 of the act where the ability to afford either a $5,000

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a person could not pay the filing fee, and *Smith v. Bennett,* 365 U.S. 708, 81 S. Ct. 895 (1961) where requiring indigents to pay filing fees before a writ of habeas corpus could be considered in state court was invalidated under the Equal Protection Clause.

cash deposit[2], a $5,000 security bond, or an expensive doctor's opinion is a *patently exclusionary condition* to obtaining access to the court. Mr. Justice Brennan made the point well in the *Boddie* case:

> "Where money determines not merely 'the kind of trial a man gets,' . . . but whether he gets into court at all, the great principle of equal protection becomes a mockery. A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee."

Nor is ability to pay necessarily the key to denial of equal protection. A state's imposition of even a minimal poll tax that did not exceed $1.50 on residents is invidious discrimination and a denial of equal protection. *Harper v. Virginia Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079 (1966).

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[2] Section 13.01(a)(1) and (2)'s sum of $5,000 would appear to be an arbitrary sum not having any point of reference to actual costs that might be incurred in a given case. The same would appear to be true for Section 13.01(b)(1) permitting an increase to $7,500. The magnitude of these sums without reference to any points of reference suggests their selection was calculated to create impermissible barriers to access to the courts.

In summary, we do not believe Section 13.01 passes muster under the Constitutions of the State of Texas[3] and of the United States and should be held invalid.

Respectfully,

/s/ J. Ray Riley
J. Ray Riley

cc: Fred E. Davis, Esq.

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[3] Plaintiff's arguments concerning the Texas Constitution and relevant cases are developed in her previously filed response to the Defendant's motion and are not repeated here.

No. 9701888

WYSONGA McGLOTHLIN, Plaintiff,	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
v.	§	345th JUDICIAL DISTRICT
JAMES R. CULLINGTON, Defendant.	§	

AFFIDAVIT OF WYSONGA McGLOTHLIN

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared WYSONGA McGLOTHLIN, known to me to be the person whose name is subscribed below, who being by me first duly sworn upon her oath deposed and said:

1. "My name is WYSONGA McGLOTHLIN. I am the Plaintiff in the above entitled and numbered cause. I have personal knowledge of the facts set forth below, and I am fully competent to testify in the court of the State of Texas.

2. "On February 16, 1995, following a determination that I had a malignant tumor in my breast, my doctor performed surgery and removed the tumor and surrounding the [sic] breast tissue. On the same day Dr. William M. Davis performed reconstructive surgery. He

inserted a breast implant in my breast. The surgery lasted a total of approximately eight hours.

3. "There was quite a bit of swelling around my right breast and under my arm. It was necessary that the liquid causing the swelling be aspirated regularly. During the recovery period Dr. Davis had to go out of town for about a week, and he asked me to go to the defendant, Dr. James R. Cullington, for medical treatment while Dr. Davis was away.

4. "When I went to Dr. Cullington he inserted the needle of a syringe into my breast, pulled it out, looked at the liquid drawn into the syringe, and said he didn't like the color of the liquid. Dr. Cullington appeared shocked, and he told me he thought he had punctured by [sic] breast implant and that the fluid he saw drawn into the syringe was from the implant itself. Dr. Cullington told me to make an appointment to see Dr. Davis as soon as Dr. Davis returned.

5. "My breast then went flat before Dr. Davis returned from being out of town. As soon as I could see Dr. Davis, he looked at my breast, saw it was flat, and said there was no doubt about it. Dr. Davis said he was going to have to fix it, but we would have to wait until the original incisions healed well enough to redo the implant. Later Dr. Davis did redo the implant.

6. The injury extended the length of my recovery from surgery and caused me anguish, worry and depression.

7. "My attorney, J. Ray Riley, has brought to my attention a "Motion to Increase Security" that has been

filed by Dr. Cullington. The motion seeks to require me to either post a $7,500 bond or place $7,500 in cash on deposit with the Court.

8. "I do not have the financial resources with which to either post a $5,000 to $7,500 bond or to pay into the registry of the Court $5,000 to $7,500 cash as a deposit.

9. I also understand there is a possibility that the Court might permit me to obtain an expert's report relating to Dr. Cullington's puncturing of my breast implant and whether that constitutes negligence. It is my understanding such an expert would have to be a physician because Dr. Cullington, the defendant in this case, is a physician. It is my further understanding, based upon information from my attorney, that an expert physician would likely require that I pay him a retainer of at least $2,000.00 in order to engage the expert and obtain a liability report from him. I do not have the financial ability to pay such a large sum of money and therefore could not obtain an expert's report.

10. If the Court requires me to either obtain an expert physician's report, obtain a $5,000 to $7,500 bond, or pay cash of $5,000 to $7,500 as a cash deposit in this case, I will be unable to comply with the Court's directive. It is my understanding the Court will dismiss my case against Dr. Cullington if I do not comply.

11. "Since I cannot comply with any such directive, if the Court dismisses my case because of failure to comply, I will be denied access to the courts of the State of Texas to seek recovery of the damages to me from what Dr. Cullington did by puncturing by breast implant. I believe such a dismissal would deny me access to the

courts as guaranteed by Article I, Section 13, of the Texas Constitution. I also believe such a dismissal of my claim would be a denial of equal protection and the due process of law that is guaranteed to citizens of the United States under the United States Constitution and its Fourteenth Amendment.

"Further the deponent sayeth not."

/s/ Wysonga McGlothlin
WYSONGA McGLOTHLIN

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this 26 day of February, 1998.

/s/ Jennifer Ashlock
Notary Public, State of Texas

No. 03-98-00205-CV

In the

THIRD COURT OF APPEALS

OF TEXAS

WYSONGA McGLOTHLIN,

Appellant,

v.

JAMES R. CULLINGTON,

Appellee.

From the 345th District Court of
Travis County, Texas

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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Appellee:	James R. Cullington
Trial and appellate counsel of Appellee:	Fred E. Davis Davis & Davis 9442 Capital of Texas Highway Arbortetum Plaza I, Suite 950 P. O. Box 1588 Austin, Texas 78767

REQUEST FOR ORAL ARGUMENT

Appellant, Wysonga McGlothlin, respectfully requests oral argument.

RECORD REFERENCES

The appellate record consists of the clerk's record, volume 1, which contains pages numbered from 1 to 56. The clerk's record is referred to in this brief by page number. for example, "CR 31" means clerk's record, volume 1, page 31.

This brief contains an appendix of documents identified by alphabetical exhibit tabs referred to as "(Appendix, Exh. ___)".

There is no reporter's record.

* * *

TABLE OF CONTENTS

Page

IDENTITY OF PARTIES AND COUNSEL..... i

REQUEST FOR ORAL ARGUMENT..... i

RECORD REFERENCES..... ii

TABLE OF CONTENTS..... iii

INDEX OF AUTHORITIES..... v

STATEMENT OF THE CASE..... viii

ISSUES PRESENTED..... ix

I. Whether in a civil action to recover damages the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution are violated by the refusal of a state court to permit the Appellant to prosecute her claim against a physician because she cannot afford:

A. a $5,000 cost bond or a $5,000 cash security deposit, or

B. a costly expert's report.

II. Whether in a civil action to recover damages the Open Courts Guarantee of the Texas Constitution is violated by the refusal of a state court to permit the Appellant to prosecute her

claim against a physician because she cannot afford:

A. a $5,000 cost bond or a $5,000 cash security deposit, or

B. a costly expert's report.

III. Whether the Texas Medical Liability and Insurance Improvement Act's 1995 amendment requiring that parties who sue physicians and health care providers demonstrate the soundness of their case by "putting their money where their mouth is" is constitutional under the Open Courts Guarantee of the Texas Constitution.

IV. Whether the Texas Medical Liability and Insurance Improvement Act's 1995 amendment of section 13.01 is a special law that violates Article III, Section 56, of the Texas Constitution.

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

* * *

No. 99-0440

THE SUPREME COURT OF TEXAS

WYSONGA McGLOTHLIN,

Petitioner,

v.

JAMES R. CULLINGTON,

Respondent.

From the Court of Appeals for the
Third District of Texas

PETITION FOR REVIEW

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Respondent: James R. Cullington

Trial and appellate counsel of Respondent: Fred E. Davis
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TABLE OF CONTENTS

Page

IDENTITY OF PARTIES AND COUNSEL..... i

TABLE OF CONTENTS..... ii

INDEX OF AUTHORITIES..... iv

STATEMENT OF THE CASE..... 1

STATEMENT OF JURISDICTION..... 1

ISSUE PRESENTED..... 2

Petitioner filed suit to recover damages arising from the wrongful puncturing of her breast implant during recovery after surgery for removal of a malignant tumor. Causes of action pled were trespass, assault and battery, and negligence. Petitioner did not have financial resources to file a $7,500 cost bond ordered by the trial court, and her case was dismissed. Does the dismissal violate the First and Fourteenth Amendments of the United States Constitution which guarantee access to State courts, equal protection of the laws, and due process?..... 2

STATEMENT OF FACTS..... 3

SUMMARY OF ARGUMENT..... 4

ARGUMENT..... 5

I. Petitioner Has A Fundamental Right Under the United States Constitution of Access to Texas Courts 5

II. A Texas Statute Has Imposed an Onerous Financial Barrier That Prevents Petitioner From Exercising Her Fundamental Constitutional Right of Access to Texas Courts 7

III. Standard Under United States Constitution for Determining Whether State Statute Abridges Fundamental Constitutional Rights Requires Reasonable Necessity 8

IV. Unnecessary Onerous Financial Barriers That prevent Exercise of Fundamental Constitutional Rights Are Unconstitutional 8

V. Goal of Reducing Frivolous Litigation Does Not Justify Making Access to Courts Unaffordable 10

VI. Section 13.01 Is Repugnant to the First and Fourteenth Amendment of the United States Constitution 13

PRAYER 16

CERTIFICATE OF SERVICE 17

APPENDIX 18

* * *